Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

KATHLEEN WARREN,

Petitioner,

v.

VOLUSIA COUNTY FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12111 *et seq.* establishes a duty upon employers to engage in an interactive process with a disabled employee to identify and seek reasonable accommodations and, if so, is the process triggered upon notice of the disability and a desire for accommodations, or must the employee specifically identify and request a particular reasonable accommodation such that if there is a defect in the request (such as using the word "retraining" rather than "reassignment") or in the method of communicating the request (such as using a personal physician or a worker's compensation attorney), the employer need do nothing and has no duty to try to accommodate the employee by interactively seeking to identify reasonable accommodations?

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Appendix C — Order Of The United States Court Of Appeals For The Eleventh Denying Petition For Rehearing Filed August 29, 2006 ..... 34a

Petitioner, Kathleen Warren, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. It is reproduced in the Appendix at App. 1a. The opinion of the District Court granting Respondent's Renewed Motion for Judgment as a Matter of Law is unreported and is reproduced in the Appendix at App. 10a.

STATEMENT OF JURISDICTION

The Court of Appeals judgment was entered on July 5, 2006. A timely petition for rehearing was denied on August 29, 2006. Appendix at App. 34a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42 United State Code, Section 12112(a)

Discrimination.

(a) **General rule**

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) **Construction**

As used in subsection (a) of this section, the term "discriminate" includes –

. . .

(5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

STATEMENT OF THE CASE

Petitioner asserts that a request for an accommodation made by Petitioner's workers compensation attorney to Respondent's attorney and management employees was sufficient to trigger an interactive process to identify a reasonable accommodation for a disabled employee under the ADA despite a failure to use certain "magic words". Thus, the jury's verdict, in favor of plaintiff should not have been disturbed.

The Eleventh Circuit's decision conflicts with the authoritative decisions of the other United States Courts of Appeal that have addressed the issue because it states that before an employer has any responsibilities to engage in an interactive process to identify a reasonable accommodation for a disabled employee, the burden is entirely on plaintiff to specifically identify and request a particular reasonable accommodation to the employer. The other circuits hold that

once the employer has notice of the employee's disability and desire for accommodation, the ADA requires the employer to engage in an interactive process with the employee to jointly identify particular reasonable accommodations.

Plaintiff Kathleen Warren was a corrections officer for the County since 1989. On September 27, 1993, Mrs. Warren sustained an on-the-job injury which aggravated pre-existing rheumatoid arthritis. As the result of that injury and the complications therefrom, Plaintiff was unable to return to her current position but able to work other positions in the Department of Corrections and other County jobs.

Mrs. Warren regularly and periodically informed the County of her condition, limitations, intentions, and abilities from October 28, 1993 through May 2, 1997 and beyond through reports from her doctor, the County's doctor, the County's short and long term benefit insurance company, and employer required incident reports.

The County unilaterally ceased workers compensation benefits on December 3, 1993 and instructed Mrs. Warren to apply for unpaid medical leave which she did. The County never communicated with Mrs. Warren nor did it seek to accommodate her known disability in any way from 1993 until she was terminated in April, 2001.

In April, 1997, Plaintiff's worker's compensation attorney asked the County to assist Mrs. Warren by retraining her for some other position. The County denied the request. Not until 2000, did the County notify Mrs. Warren that it intended to terminate her employment. On March 28, 2001, the County sent written notice to Plaintiff that it intended to

terminate her general leave of absence and Plaintiff was advised for the first and only time to contact the Corrections Administration to inquire regarding the availability of ADA accommodations.

A Notification of Right to Sue was received from the Equal Employment Opportunity Commission through the Department of Justice, Civil Rights Division on or about July 30, 2003 and this action was commenced within 90 days of the receipt of the Notification of Right to Sue.

Plaintiff sued pursuant to the ADA seeking compensatory damages, equitable relief, and the attorney's fees, costs and disbursements of this action. The trial judge bifurcated the trial and a four day trial was held resulting in a jury verdict in favor of plaintiff on liability on September 13, 2005. A special verdict specifically concluded that Mrs. Warren or her representative requested an accommodation, the requested accommodation was reasonable; and the County unreasonably refused the accommodation.

Defendant filed a Renewed Motion for Judgment as a Matter of Law on September 23, 2005. A final judgment in favor of defendant was entered October 18, 2005 following an order granting defendant's renewed motion for judgment as a matter of law entered October 17, 2005. Plaintiff filed a notice of appeal on November 16, 2005. The panel issued an opinion entered on July 5, 2006 affirming the ruling of the district court. A timely motion for rehearing en banc was denied on August 29, 2006.

The Eleventh Circuit's decision essentially holds that there is no interactive process requirement in the ADA because if there is a defect in the form or manner of the

request, such as using the word "retraining" rather than "reassignment", the request was *ipso facto* unreasonable. The sufficiency of the request turns on which word was used or omitted and the identity and authority of the person making the request. The other circuits avoid such a Draconian result by requiring an employer to assist the employee in identifying reasonable accommodations in an informal interactive process after notice of the disability and the desire for accommodation. The form and manner of the notice and the desire for accommodation can take many forms and do not require magic words of inclusion or poison words such as "retraining". Similarly, the fact of notice and not the manner of communicating the notice is dispositive, such that it need not come from the employee herself but from other sources which reasonably convey the extent of the employee's disability and desire for accommodation.

REASONS FOR GRANTING THE PETITION

In conflict with the other circuits considering the issue, the Eleventh Circuit has never expressly held that the ADA requires an employer to engage in an interactive process with the employee to identify reasonable accommodations, including reassignment. *Cf. Beck v. Univ. of Wisc. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996), with *Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997) and *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1256 n.2 (11th Cir. 2001).

The Eleventh Circuit has avoided squarely addressing whether such a duty exists by finding that employees in various situations failed to trigger or otherwise comply with the interactive process even if one hypothetically exists.

Willis v. Conopco, 108 F.3d 282 (11th Cir. 1997); *Lucas v. W.W. Grainger Inc.*, 257 F.3d 1249, n. 2 (11th Cir. 2001); *Earl v. Mervyns Inc.*, 207 F.3d 1361, 1367 (11th Cir. 2000); *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278 (11thCir. 1997).

In our case, the Eleventh Circuit similarly holds that even if such a duty exists, Mrs. Warren failed to trigger it by not specifically identifying and requesting a particular reasonable accommodation. Specifically, the Court of Appeals held that even though Mrs. Warren's attorney requested the County to assist her in finding another position within her capabilities, such a request was *ipso facto* not a request for a specific reasonable accommodation because it used the word "retraining" not reassignment. Moreover, it refused to consider the numerous doctor's reports submitted to the County as requests for accommodations because the doctor was not Mrs. Warren's agent for the purpose of requesting ADA accommodations from the County.

The Eleventh Circuit, therefore, holds that requests for accommodations under the ADA must be made by specifically authorized agents and cannot contain the word "retraining". If either mistake is made by the employee, the employer can simply refuse to consider any accommodations and never be obligated to request more information or otherwise participate in an interactive process even if it is proved at trial that such accommodations existed, were vacant, and the employee was qualified for the positions without retraining. In holding such formalities necessary to trigger any theoretical interactive process, the Eleventh

Circuit is in direct conflict with the other circuits considering the issue.[1]

In *Equal Empl. Opportunity Commn. v. Sears*, 417 F.3d 789 (7th Cir. 2005) the Seventh Circuit held that the notice necessary to trigger the interactive process "requires *at most* that the employee indicate to the employer that she has a disability and desires an accommodation." *Sears*, 417 F.3d at 803 (emphasis added) (citations omitted). It notes that in some cases, an employee may not even need to explicitly request an accommodation and that the key is notice to the employer, not the employee specifically identifying a particular accommodation. That is the purpose of the process: "to determine the extent of the disability and what accommodations are appropriate and available." *Sears*, 417 F.3d at 804 (citation omitted). "Where notice is ambiguous as to the . . . desired accommodation, but it is sufficient to notify the employer that the employee may have a disability that requires accommodation, the employer must ask for clarification." *Sears*, 417 F.3d at 804 (citation omitted).

The Third Circuit in *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296 (3d Cir. 1999) analyses the manner and form of the notice required to trigger the interactive process. It then favorably cites the EEOC compliance manual that all that is necessary is notice "that the employee wants assistance for his or her disability." *Phoenixville*, 184 F.3d at 313. The

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1. The Fourth Circuit has evidently not ruled one way or the other on whether the interactive process is mandatory or what would trigger it. The D.C. Circuit and the Federal Circuit appear to adopt the interactive process but do not define its triggers or parameters. *Office of the Architect of the Capitol v. Office of Compliance*, 361 F.3d 633 (Fed. Cir. 2004); *Breen v. Dept. of Transportation*, 282 F.3d 839 (D.C. Cir. 2002).

"notice does not have to be in writing, be made by the employee, or formally invoke the magic words 'reasonable accommodation' . . ." *Phoenixville*, 184 F.3d at 313.

> What matters under the ADA are not formalisms about the manner of the request, but whether the employee or a representative for the employee provides the employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation.

Phoenixville, 184 F.3d at 313.

In *Tobin v. Liberty Mut. Ins. Co.*, 433 F.3d 100, 108 (1st Cir. 2005) the First Circuit holds "once the employer becomes aware of the disability of an employee, he is expected to engage in a meaningful dialogue with the employee to find the best means of accommodating that disability."

The Second Circuit also finds that an interactive process is required by the ADA "by which employers and employees work together to assess whether an employee's disability can be reasonably accommodated." *Lovejoy-Wilson v. Noco Motor Fuel Inc.*, 263 F.3d 208, 218 (2nd Cir. 2001).

In *Cutrera v. Board of Sup'rs of Louisiana State University*, 429 F.3d 108 (5th Cir. 2005) the Fifth Circuit states:

> In general . . . it is the responsibility of the individual with the disability to inform the employer that an accommodation is needed. Once

> such a request has been made, [t]he appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability. . . . However, when an employer's unwillingness to engage in a good faith interactive process leads to a failure to reasonably accommodate an employee, the employer violates the ADA.

Cutrera, 429 F.3d at 112 (internal quotes and citations omitted).

The Eleventh Circuit's decision sets a different standard by stating that the request for accommodation must be "specific" and "identified". In *Cutrera*, the employee was unable to suggest any accommodation before termination, but the court held that the employer's "awareness" of the employee's disability and intention to return to work "triggered the [employer's] obligation to participate in an interactive process with Cutrera to attempt to identify a reasonable accommodation for Cutrera's disability." *Cutrera*, 429 F.3d at 113.

In *Smith v. Henderson*, 376 F.3d 529, 535 (6th Cir. 2004) the Sixth Circuit found that since the employer was aware of the employee's disability and her need to work restricted hours, a factfinder could infer that the employee's letter constituted a request for an accommodation even though the letter did not use the word "accommodation" or specifically mention that she was seeking to delegate job duties because of her disability.

The Eighth Circuit holds:

> Where the employee requests accommodation, the employer must engage in an "informal, interactive process" with the employee to identify . . . the potential reasonable accommodations to overcome those limitations. An employer hinders this process when: the employer knows about the employee's disability; the employee requests accommodations *or assistance*; the employer does not in good faith assist the employee in seeking accommodations; and the employee could have been reasonably accommodated but for the employer's lack of good faith.

Battle v. United Parcel Service, Inc., 438 F.3d 856, 862 - 63 (8th Cir. 2006) (emphasis added) (citations omitted).

These cases can be reconciled with prior Eleventh Circuit cases but not with the decision herein. In the previous cases, the failure to specifically identify a reasonable accommodation was a failure of proof at trial and not an essential element of the trigger.

In *Willis v. Conopco*, 108 F.3d 282 (11th Cir. 1997) plaintiff argued that the ADA did not require a request for a specific accommodation but merely a general request for assistance to trigger the interactive process. But, since Willis did not prove the existence of any reasonable accommodation at trial, the question of the trigger was moot. Similar proof problems of identification of reasonable accommodations at trial are present in *Lucas v. W.W. Grainger Inc.*, 257 F.3d 1249, n. 2 (11th Cir. 2001); *Earl v. Mervyns Inc.*, 207 F.3d

1361, 1367 (11th Cir. 2000); and *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278 (11thCir. 1997)

At trial, there is no question that Mrs. Warren specifically identified many jobs which were open, available, and permanent for which she was qualified without retraining. The Eleventh Circuit essentially held that Mrs. Warren must have specifically requested these jobs as part of her request for accommodation or the employer was under no duty to engage in an interactive process because "the burden is entirely on the plaintiff."

If the Eleventh Circuit's standard is true, it is hard to understand the "interactive" part of the interactive process. If the burden is entirely on the employee to formally request a specifically identified reasonable accommodation before the employer has any responsibilities then there would be no need for interaction or for any process at all. The employee would just specifically identify the accommodation and the employer would have to comply.

The Ninth Circuit certainly does not place such a Draconian burden on the employee. It writes:

> we join explicitly with the vast majority of our sister circuits in holding that the interactive process is a mandatory rather than a permissive obligation on the part of employers under the ADA and that this obligation is triggered by an employee or an employee's representative giving notice of the employee's disability and the desire for accommodation. In circumstances in which an employee is unable to make such a request, if the

> company knows of the existence of the employee's disability, the employer must assist in initiating the interactive process.

Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000) vacated on other grounds, *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002).

The Tenth Circuit is in accord holding

> The interactive process must ordinarily begin with the employee providing notice to the employer of the employee's disability ... and expressing a *desire for reassignment* if no reasonable accommodation is possible in the employee's existing job. Once the employer's responsibilities ... are triggered ... both parties have an obligation to proceed in a reasonably interactive manner to ... identify an appropriate reassignment opportunity if any is reasonably available.

Albert v. Smith's Food & Drug Centers, Inc., 356 F.3d 1242, 1252 (10th Cir. 2004) (emphasis added).

Thus, no other circuit places the burden entirely on the employee to identify and specifically request, through a specifically authorized representative, an accommodation that does not require any retraining, is open, available, and permanent, is not a promotion or in any other way unreasonable *before* the employer has any obligations whatsoever to interact with the employee to see if a reasonable accommodation might exist. Even where, as here, it is proven at trial that numerous reasonable accommodations

existed for which no retraining was necessary, plaintiff is simply out of luck because she didn't have herself or a specially authorized representative specifically identify and request those particular accommodations in 1997.

The Circuit Court also implies that Mrs. Warren's failure to contact a specific department – personnel – was significant. This is another example of the formalism of the Eleventh Circuit's approach as opposed to its sister circuit's emphasis on substance over form. The County conceded that it never attempted to afford Mrs. Warren assistance with finding another position. Not until March 2001 was she was told to contact Corrections Administration to discuss reasonable ADA accommodations. The County's employees testified at trial that a requirement to report to personnel as if one was not already a County employee would make no sense and was not required of anyone else.

In short, the Eleventh Circuit has isolated itself against its sister circuits by holding that when requesting an accommodation under the ADA, the burden is entirely on the employee to do everything perfectly. If Mrs. Warren had done the same things in Illinois rather than Florida, there is little doubt that the Seventh Circuit would not have disturbed the jury's verdict. The same result would apply for Kentucky, Louisiana, Arkansas, New Mexico, California, Pennsylvania or any other state outside of the jurisdiction of the Eleventh Circuit. The ADA is remedial legislation for the protection of the disabled. The decision appealed from herein has turned it into a trap for the unwary. Under this decision, any mistake in the form or manner of a request for accommodation can keep the employer from engaging in an interactive process despite notice of the disability and desire for accommodation. Such an approach eviscerates the ADA and the statutory duty to reasonably accommodate known disabilities.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JANUARY 5, 2006

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05-16411
Non-Argument Calendar

D.C. Docket No. 03-01529-CV-ORL-28-JGG

Kathleen WARREN,

Plaintiff-Appellant,

v.

VOLUSIA COUNTY, FLORIDA,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(July 5, 2006)

Before ANDERSON, BIRCH and KRAVITCH, Circuit Judges.

PER CURIAM:

Kathleen Warren appeals the district court's grant of judgment as a matter of law in her employment discrimination

action, brought pursuant to the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12111. After a thorough review of the record, we affirm.

Warren filed a complaint against Volusia County (the "County"), alleging that she was a qualified individual who was disabled and that the County failed to provide a reasonable accommodation under the ADA, 42 U.S.C. § 12111.

In its answer to the complaint, the County averred, inter alia, that Warren never requested a reasonable accommodation.[1]

According to the evidence at trial, Warren worked for the County as a corrections officer from 1989 until 1993, when she was injured in a work-related incident. When she began her employment, she suffered from rheumatoid arthritis, which was exacerbated by this injury. She received treatment with Drs. Martin and Mathews. In a chart note dated November 24, 1993, Dr. Martin indicated that Warren should

1. The County did not move for summary judgment. Prior to trial, the court instructed the parties to brief whether Warren was a disabled individual and whether her claims were timely. In response, Warren argued that her physicians had submitted reports recommending that she be reassigned to clerical or sedentary positions because her injury prevented her from returning to her former position, and that the County failed to engage in an interactive process to determine a reasonable accommodation. The County disputed that the physician's report was sufficient to request accommodation. In response, Warren asserted that her request for reassignment was sufficient to trigger the County's responsibility to engage in an interactive process.

be retrained in some type of lighter work. He reiterated this conclusion in his December 1993 note. In May 1994, Warren was released to return to work light duty. Dr. Mathews submitted statements to the insurance companies in 1994 and 1995, each time indicating that Warren could no longer perform her former job but that she was capable of performing sedentary activities. In the following years, Warren took time off under the Family Medical Leave Act and requested leaves of absences and short term disability due to her injuries. She also eventually hired counsel and sought worker's compensation. The claim settled in 1997. During the settlement communications between Warren's attorney and the County's risk management official, counsel requested the County retrain Warren for another position. The County informed Warren that she could speak with personnel about open positions within her restrictions. Sometime thereafter, Warren contacted the Florida Commission on Human Relations to investigate her claim of discrimination. Between 1997 and 2001, Warren never notified the County of her work status. Warren remained on leave of absence, and, in 2000, the County notified her that it would terminate her employment due to the extent of her leave. Warren responded that she would await the outcome of the Florida Commission on Human Relations investigation. In 2001, the County informed her that it would revoke her leave status. It encouraged her to speak with personnel to discuss options, including reasonable accommodations. Warren again responded that she would await the outcome of the investigation. The County then terminated her employment.

Warren testified that she had done everything she could, and everything the County asked her to do, to return to work,

and that between 1993 and 1997, she believed the County would find a position for her. She also believed there were other positions available that she was qualified to perform, but that she was never told to contact personnel to see about the positions. She admitted that she never applied for any other position and never wrote to the County to request accommodation. She stated that she had not seen the 1997 letter between her attorney and the risk management official indicating that she should contact personnel. She also stated that her attorney never told her to contact personnel about open positions. Although she admitted that she personally never requested an accommodation, and that her physician was not authorized to act as her representative to request any accommodation, she testified that her attorney made a request during the worker's compensation settlement in 1997.

At the conclusion of the evidence, the County moved for judgment as a matter of law, asserting, inter alia, that the doctor was not Warren's agent, Warren never requested any accommodation, and retraining was not a reasonable accommodation. The court took the motion under advisement, and permitted the case to go to the jury.

The jury found in Warren's favor, specifically concluding that Warren or her representative requested an accommodation; the requested accommodation was reasonable; and the County unreasonably refused the accommodation.

The County renewed its motion for judgment as a matter of law, arguing that the only possible request for an accommodation was in the letter in regard to the worker's

compensation claim. It noted that the response specifically informed Warren that she could talk to personnel, but that Warren never took that step. It further argued that a request to retrain did not qualify as a request for an accommodation because retraining implied that Warren was not qualified for the position. The County also noted that Warren testified that the doctor was not acting as her agent.

Warren responded that she was not required to use magic words to request an accommodation, and that the information from her physician was enough. She further reiterated that the County was required-and failed-to engage in an interactive process to find a reasonable accommodation.

The district court granted the County's motion, finding, inter alia, that no reasonable jury could have concluded that Warren requested a reasonable accommodation. The court noted that Warren was required to make a specific demand, and that the attorney's statement during a worker's compensation settlement was not sufficient. The court further explained that a request to retrain would not qualify as a reasonable accommodation. Accordingly, the court granted the County judgment as a matter of law. Warren now appeals.

Warren argues that there was sufficient evidence for the jury to conclude that she or her representative requested an accommodation because no magic words were required and the County was on notice that she wanted to return to work.[2]

2. Warren also argues for the first time that it is unknown whether the attorney requested retraining or reassignment. She raises this claim for the first time on appeal. Arguments raised for the first (Cont'd)

She disputes that the request for retraining was insufficient because the County should have worked with her to determine if there were positions available that did not require retraining.[3] She asserts that the district court's position "places all the burden on the employee and no responsibility whatsoever on the employer." She states that it was sufficient that the County knew of her disability, her limitations, and her desire to return to work to trigger her right to an accommodation.

We review the district court's grant of a motion for judgment as a matter of law de novo. *Collado v. United Parcel Serv., Co.*, 419 F.3d 1143, 1151 (11th Cir.2005). This court draws "all reasonable inferences ... in the light most favorable to the nonmoving party. Where no legally sufficient evidentiary basis exists for a reasonable jury to find for that party on that issue, judgment as a matter of law is proper." *Rossbach v. City of Miami*, 371 F.3d 1354, 1356 (11th Cir.2004) (citations and quotations omitted).

The ADA forbids covered employers from discriminating "against a qualified individual with a disability because of the disability of such individual in regard to ... discharge of

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(Cont'd)
time on appeal are not considered by this court, absent one of five exceptions not applicable here. *Narey v. Dean*, 32 F.3d 1521, 1526-27 (11th Cir.1994).

3. This argument is misplaced. An employer's duty to engage in an interactive process does not trigger until the employee has identified and requested accommodation. *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1256 n. 2 (11th Cir.2001).

employees." 42 U.S.C. § 12112(a) (2000). To establish a prima facie case of employment discrimination under the ADA, a plaintiff must demonstrate "that (1) [s]he has a disability, (2)[s]he is a 'qualified individual,' which is to say, able to perform the essential functions of the employment position that [s]he holds or seeks with or without reasonable accommodation, and (3) the defendant unlawfully discriminated against [her] because of the disability." *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1226 (11th Cir.2005).

An employer unlawfully discriminates against a qualified individual with a disability when the employer fails to provide "reasonable accommodations" for the disability-unless doing so would impose undue hardship on the employer. 42 U.S.C. § 12112(b)(5)(A); *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1255 (11th Cir.2001). "The plaintiff bears the burden of identifying an accommodation, and of demonstrating that the accommodation allows him to perform the job's essential functions." *Id.* at 1255-56; *Earl v. Mervyn's, Inc.*, 207 F.3d 1361, 1367 (11th Cir.2000); *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1286 (11th Cir.1997). An employee's failure to request a reasonable accommodation is fatal to the prima facie case; "the duty to provide a reasonable accommodation is not triggered unless a specific demand for an accommodation has been made." *Gaston v. Bellingrath Gardens & Home, Inc.*, 167 F.3d 1361, 1363 (11th Cir.1999).[4]

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4. Moreover, the EEOC's interpretive guidelines, issued pursuant to its authority to issue regulations under the ADA, provide that "[i]n general . . . it is the responsibility of the individual with a (Cont'd)

Here, the evidence, viewed in the light most favorable to Warren, established that Warren never requested any accommodation, either on her own or through a representative. Warren herself admitted that she never requested a accommodation, never contacted personnel, and never inquired about open positions for which she was qualified. Contrary to Warren's argument, the burden is entirely on the plaintiff. *Lucas*, 257 F.3d at 1255-56. Additionally, she admitted that the physician was not acting as her representative, and, therefore, his notations that light duty or sedentary jobs were necessary did not constitute a request for an accommodation.

Furthermore, the attorney's request for retraining did not qualify as a request under the ADA because retraining is not a reasonable accommodation. *See Turner v. Mobile Infirmary Ass'n*, 1997 WL 827532 (S.D.Ala.1997) (unpublished), *aff'd*, 149 F.3d 1196 (11th Cir.1998) (unpublished). If an employee must be retrained in order to fulfill the job requirements, the employee is not "qualified" under the ADA. *Willis v. Conopco, Inc.*, 108 F.3d 282, 284 (11th Cir.1997) (noting that the plaintiff must be qualified for the reassignment she seeks). The ADA does not require the County to reassign Warren to a position for which she was not qualified. *Lucas*, 257 F.3d at 1259; *Taylor v. Food World*, 133 F.3d 1419, 1425 (11th Cir.1998).

(Cont'd)

disability to inform the employer that an accommodation is needed." 29 C.F.R. pt. 1630 App. § 1630.9. "Once a qualified individual with a disability has requested provision of reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation." *Id.*

Appendix A

In light of this evidence, even viewed most favorably to Warren, no reasonable jury could have concluded that Warren requested a reasonable accommodation.

Accordingly, we AFFIRM.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION FILED OCTOBER 17, 2005

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 6:03-cv-1529-Orl-28JGG

KATHLEEN WARREN,

Plaintiff,

-vs-

VOLUSIA COUNTY, FLORIDA,

Defendant.

ORDER

This cause is before the Court on the motion for judgment as a matter of law filed by the Defendant, Volusia County, Florida ("the County") under Rule 50 of the Federal Rules of Civil Procedure. The County made an ore tenus Rule 50 motion during trial (*see* Doc. 50), and the Court reserved ruling on the motion and submitted the case to the jury. The jury returned a verdict (Doc. 53) in favor of the Plaintiff, Kathleen Warren ("Ms. Warren"),[1] and the County has now

1. The trial was bifurcated into liability and damages phases. The verdict relates only to the issue of liability; the damages phase of the trial has not been conducted.

renewed its Rule 50 motion (Doc. 56). For the reasons set forth below, the County's motion must be granted.

I. Background

Ms. Warren became employed as a corrections officer for the County in 1989. On September 27, 1993, she sustained an on-the-job injury to one of her wrists. Ms. Warren briefly returned to work but then went out on leave based on doctor's notes. (*See* Pl.'s Trial Br., Doc. 25 at 2). In addition to her on-the-job injury, Ms. Warren also suffers from rheumatoid arthritis, a condition which she has had since before she began working for the County and which has progressively worsened over time. Although Ms. Warren remained as an "inactive" County employee for years after her injury – on various leave statuses – she did not actively work for the County (as a corrections officer or otherwise) after October 1993.

Ms. Warren received workers' compensation benefits for a brief period, followed by short- and long-term disability benefits. She ultimately filed a workers' compensation case against the County, and that case was settled in 1997 for $2500. Ms. Warren testified at trial that she was completely disabled from all types of work as of late 1999. However, she claims that she was able to work prior to that time and that the County discriminated against her by not accommodating her disability. Ms. Warren filed this suit in 2003 seeking relief under the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("the ADA"), based on the County's alleged failure to accommodate her disability.

Appendix B

II. Directed Verdict Standard

Rule 50(a)(1) provides:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Fed. R. Civ. P. 50(a)(1). "[T]he trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).[2] "Judgment as a matter of law for the defendant is due when there is insufficient evidence to prove an element of the claim, which means that no jury reasonably could have reached a verdict for the plaintiff on that claim." *Collado v. United Parcel Serv. Co.*, 419 F.3d 1143, 1149 (11th Cir. 2005).

III. The Merits of the County's Rule 50 Motion

Prohibited employment discrimination under the ADA includes "not making reasonable accommodations to the

2. As the Supreme Court noted in *Anderson*, the directed verdict standard mirrors the standard for summary judgment under Federal Rule of Civil Procedure 56. 477 U.S. at 250. The County did not file a motion for summary judgment in this case.

known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business." 42 U.S.C. § 12112(b)(5)(A). On the verdict form, the jury was asked to determine: (1) whether Ms. Warren had a "disability" under the ADA; (2) whether Ms. Warren was a "qualified individual" under the ADA; (3) whether Ms. Warren or someone on her behalf informed the County of the substantial limitations arising out of Ms. Warren's disability; (4) whether Ms. Warren or someone on her behalf identified and requested an accommodation from the County; (5) whether the requested accommodation was reasonable, was available, and would have allowed Ms. Warren to perform the essential functions of the job; and (6) whether the County unreasonably refused to provide that accommodation. (Verdict, Doc. 53). The jury answered "Yes" to each of these questions. (*Id.*). However, the evidence presented at trial was insufficient as a matter of law to support most of these conclusions, and thus the County's motion for directed verdict must be granted.

In its Rule 50 motion, the County makes numerous arguments, some of which are subarguments of, or intertwined with, others. Most fundamentally, the County contends that Ms. Warren was not disabled and that she did not ever advise the County that she desired to or was able to return to work for the County. The County asserts that the documents submitted regarding Ms. Warren's condition repeatedly stated that it was "unknown" when she would be able to return to work, not just at her job as a corrections officer but at any job. The County further argues that, at best,

Ms. Warren requested, in the context of her workers' compensation case, retraining for another position – a common workers' compensation remedy – but that retraining is not required of employers under the ADA.

The crux of this case is whether there is evidence to support a finding that Ms. Warren ever requested, or was denied, an accommodation by the County. After brief treatment of the "disability" issue, the overriding issue of whether Ms. Warren ever requested an accommodation will be addressed.

A. Disability

The County contends that Ms. Warren was not "disabled" during the relevant time period. However, Ms. Warren presented enough evidence on this issue to create a jury question. Ms. Warren contended that she was disabled because she was substantially limited in the major life activities of working, performing manual tasks, and caring for oneself. Evidence was presented to support a jury finding that, at least with respect to the major life activity of caring for oneself, Ms. Warren was substantially limited. Thus, as to this finding the County's motion is denied.

B. Reasonable Accommodation

As noted above, the ADA requires an employer to "mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation

would impose an undue hardship on the operation of the business." 42 U.S.C. §12112(b)(5)(A). The County essentially contends that (even assuming that Ms. Warren had a disability) Ms. Warren never informed the County that she needed or desired an accommodation from the County. The County further argues that she did not establish that she was "otherwise qualified" because she did not inform the County that she had been released back to work and did not establish that there were specific positions to which she could have been reassigned. The County is correct; Ms. Warren's case fails because, inter alia, she did not establish that she ever requested an accommodation.[3]

In *Gaston v. Bellingrath Gardens & Home, Inc.*, 167 F.3d 1361, 1363 (11th Cir. 1999), the Eleventh Circuit concluded that the plaintiff's claim that her employer "discriminated against her by failing to provide a reasonable accommodation fail[ed] for a . . . basic reason – she never requested a reasonable accommodation." In that case, the plaintiff resigned several weeks after the guidelines for her job as a gift shop cashier were changed to include lifting requirements. The plaintiff did not request an accommodation, but merely told her boss that the boss knew

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3. Because Ms. Warren did not request an accommodation, the County cannot be found to have denied her an accommodation. This conclusion disposes of the County's argument that Ms. Warren's EEOC charge was not timely filed. Because there was never a request for, or denial, of an accommodation, there is no date from which to measure timeliness; stated differently, there was no basis for the charge, and thus the timing issue is moot. This is not a flaw in the County's arguments but a circularity created by the lack of merit to Ms. Warren's case.

she could not meet the new requirements and "resigned without explanation." The court found that the plaintiff's "failure to demand a reasonable accommodation after being shown the new job requirements is fatal to her ability to prevail on her claim that [her employer] discriminated against her by failing to provide a reasonable accommodation." 167 F.3d at 1364; *accord Johnston v. Henderson,* 144 F. Supp. 2d 1341, 1353 (S.D. Fla. 2001) ("Assuming arguendo that Johnston was entitled to reasonable accommodation, the evidence in this case conclusively establishes that Johnston never requested an accommodation for any of her impairments alleged here. Under these circumstances summary judgment on Johnston's disability claim is warranted."); *Quick v. Tripp, Scott, Conklin & Smith, P.A.,* 43 F. Supp. 2d 1357, 1369 n.8 (S.D. Fla. 1999) ("In the Eleventh Circuit, the scope of an employer's duty to reasonably accommodate a disabled employee is not triggered unless the employee specifically demands an accommodation.") (citing *Gaston); see also Taylor v. Principal Fin. Group,* 93 F.3d 155, 165 (5th Cir. 1996) ("If the employee fails to request an accommodation, the employer cannot be held liable for failing to provide one. . . . When the nature of the disability, resulting limitations, and necessary accommodations are uniquely within the knowledge of the employee and his health-care provider, a disabled employee cannot remain silent and expect his employer to bear the initial burden of identifying the need for, and suggesting, an appropriate accommodation."); *Becker v. Gallaudet Univ.,* 66 F. Supp. 2d 16, 22-23 & n.7 (D.D.C. 1999) ("It is undisputed . . . that [the plaintiff] did not request that an interpreter be provided. . . . This is fatal to [her] ADA claim, as the ADA does not impose a general duty on an

employer to provide unrequested accommodations. . . . The legislative history of the ADA goes even further to state that an employer should not attempt to provide an accommodation unless the employee requests it: 'In the absence of a request, it would be inappropriate to provide an accommodation, especially where i[t] could adversely impact upon the individual.'") (quoting H. Rep. No. 485(II) at 65, 1990 U.S.C.C.A.N. at 347).

Like the plaintiff in *Gaston,* Ms. Warren failed to request an accommodation from the County, and thus her claim fails. Although Ms. Warren claims that she sought an accommodation through agents and through documentation that was submitted to the County, none of the alleged "requests" presented at trial is sufficient to support the jury's finding that a request was made to the County for an accommodation.

In their motion papers (Docs. 56, 57, & 59), the parties focus on an alleged request for accommodation that was made in April 1997. That alleged request is noted in an April 8, 1997 letter (Pl.'s Ex. 112) from the attorney representing the County's workers' compensation carrier to the County's risk management office – the office that handled workers' compensation issues.[4] That letter notes the enclosure of a pretrial stipulation in Ms. Warren's then-pending workers' compensation suit and advises the County that trial in that case had been scheduled for a few months later. (Id.). The letter states in part: **"[Ms. Warren's workers' compensation**

4. (*See also* Pl.'s Ex. 116 (describing law firm as representing the County and its workers' compensation insurance carrier)).

attorney] asked if the County would be able to assist [Ms. Warren] by retraining her for some other position. I advised him that any payment by the County to the claimant for any reason would revive the statute so I don't think we want to do that. The claimant is certainly welcome to go through personnel to see if there are any positions open that are within her restrictions and apply for them."[5] (*Id.*) (emphasis added). Within a few weeks of this letter, Ms. Warren's workers' compensation case was settled for $2500. (*See* Pl.'s Exs. 116 & 117).

Although Ms. Warren contends that the request for retraining referenced in this April 1997 letter amounts to a request for an accommodation, the County is correct that the request noted in this letter was insufficient to have this effect. This "request" was made in the context of Ms. Warren's workers' compensation case and, more specifically, in the context of settlement negotiations. Ms. Warren herself describes the request as seeking "accommodation for a disabled employee albeit in the context of workers' comp litigation." (Doc. 57 at 5). There was unrefuted testimony at trial that retraining is a common remedy in the workers' compensation context, and thus the mention of retraining in workers' compensation settlement negotiations is not surprising.

Retraining is *not,* however, recognized as a "reasonable accommodation" under the ADA. *See, e.g., Turner v. Mobile Infirmary Ass'n,* No. CIV.A. 96-0758-CB-M, 1997 WL

5. Curiously, at trial Ms. Warren testified that her workers' compensation attorney did not tell her about this letter and that she did not learn of it until January 2002.

827532, at *4 (S.D. Ala. Oct. 2, 1997) ("[The plaintiff] argues that the defendant had an obligation to train her for the position pursuant to its ADA accommodations policy. Plaintiff's argument is flawed for several reasons. First, the ADA does not require an employer to reassign a disabled person to a position for which she is unqualified."); *Quintana v. Sound Distrib. Corp.*, No. 95 CIV 0309 LAP, 1997 WL 40866, at *6 (S.D.N.Y. Feb. 3, 1997) ("The ADA's directive to accommodate an employee, however, does not require an employer to 'make accommodations that "are primarily for the [individual's] personal benefit."' Nor is an employer required to transfer and retrain an employee for an entirely different position.") (quoting *Lyons v. Legal Aid Soc'y*, 68 F.3d 1512, 1516 (2d Cir. 1995)). Indeed, Ms. Warren does not argue otherwise. *(See, e.g.*, Pl.'s Mem. in Opp'n to Mot. for J. as a Matter of Law, Doc. 57 at 7) (stating that none of the clerical jobs which Ms. Warren allegedly desired "required the retraining which would disqualify her under the ADA"). Thus, even if the retraining mentioned in this letter were construed as a request for an accommodation, it is not a request for a "reasonable accommodation" under the ADA. *See Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1367 (11th Cir. 2000) ("A request to arrive at work at any time, without reprimand, would in essence require [the employer] to change the essential functions of [the plaintiff's] job, and thus is not a request for a reasonable accommodation. [The employer] was therefore under no duty to engage in an 'interactive process' or to show undue hardship.").

Additionally, Ms. Warren did not argue at trial, and does not argue now in her opposition memorandum, that the reasonable accommodation she sought was *retraining*.

Instead, she now argues that the reasonable accommodation to which she was entitled was *reassignment* to another position for which was allegedly already qualified without a need for retraining. However, there is no evidence that Ms. Warren ever advised the County that she wanted to be reassigned, and she may not do so for the first time during litigation.

During her trial testimony, Ms. Warren claimed that she wanted to be accommodated by being assigned to a clerical position. However, there is absolutely no evidence that she informed the County that she desired such an accommodation. Ms. Warren may not now suggest an accommodation which she did not seek from her employer at the relevant time – when she allegedly needed it. As another district court in this circuit has explained:

> [T]he ADA claimant, who is in the best position to know what accommodation is needed, must request a reasonable accommodation at the time the disability in question presents a problem on the job.
>
> In other words, it is simply too late to raise suggested accommodations two years later in a summary-judgment response brief. The essence of the ADA claim is discrimination in the work place, which means while the employee is *on* the job. Hence, the employee must show that he requested a reasonable accommodation while on the job (or that the adaptation constituting the suggested accommodation was reasonably

> apparent) but the employer simply refused to make that accommodation, thereby discriminating against the employee at the time. Without this requirement the employee could casually mention a claimed disability, say nothing, wait to be terminated, then think up new suggested accommodations years later while in the midst of ADA litigation. This would unfairly subject the employer to a "retro-discrimination" standard, where the employer "should have thought of" the accommodation at the time even if the employee did not.

Fussell v. Ga. Ports Auth., 906 F. Supp. 1561, 1569-70 (S.D. Ga. 1995) (emphasis in original) (citations omitted); *accord Frix v. Fla. Tile Indus., Inc.*, 970 F. Supp. 1027, 1038 (N.D. Ga. 1997) ("Generally, an employee has the burden of suggesting a desired accommodation at the time the disability in question presents a problem on the job.") (citing *Fussell*). In her trial brief, Ms. Warren conceded that "Plaintiff must show that the employer was made aware of a request for reassignment." (Pl.'s Trial Br., Doc. 25 at 11). Ms. Warren did not make such a showing, and thus the jury's verdict cannot stand.

Mrs. Warren tries to avoid the effect of her failure to ever request reassignment prior to litigation by arguing that the County failed to engage in an "interactive process" to arrive at a reasonable accommodation for Ms. Warren. However, this argument is without merit. First, as Ms. Warren concedes, the Eleventh Circuit has not specifically adopted an "interactive process" requirement per se, as other circuits

have. *Compare Beck v. Univ. of Wisc. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996) (noting "interactive process" envisioned in the regulations implementing the ADA), *with Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997) (noting *Beck* but not expressly endorsing it, stating that "[e]ven assuming an employer has an affirmative obligation – absent an employee's suggestion for a specific accommodation – to engage in the interactive process Plaintiff advocates, we have held that, where a plaintiff cannot demonstrate 'reasonable accommodation,' the employer's lack of investigation into reasonable accommodation is unimportant"), *and Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1256 n.2 (11th Cir. 2001) (noting plaintiff's "interactive process" argument and stating that "regardless of whether the ADA required ... an interactive process, [the plaintiff's] claims fail unless he can show that an accommodation could have been made"). Second, even if the Eleventh Circuit had adopted such a requirement, an "interactive process" would not arise until Ms. Warren requested an accommodation in the first instance. *See, e.g., Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1367 (11th Cir. 2000) (stating that because the employee did not request a reasonable accommodation the employer "was therefore under no duty to engage in an 'interactive process' or to show undue hardship"); *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 165 (5th Cir. 1996) ("[O]nce an accommodation is properly requested, the responsibility for fashioning a reasonable accommodation is shared between the employee and employer. Thus, it is the employee's initial request for an accommodation which triggers the employer's obligation to participate in the interactive process of determining one. If the employee fails to request an accommodation, the

employer cannot be held liable for failing to provide one.") (citation and footnote omitted). As a matter of law the April 1997 "request" was insufficient to trigger such an "interactive process." *See Earl,* 207 F.3d at 1367.

Additionally, to the extent that Ms. Warren contends that the County violated its own policy by not engaging in an interactive process with her – or otherwise violated its policies in its dealings with her – she is incorrect that such a violation would expose the County to ADA liability. *See Turner v. Mobile Infirmary Ass'n,* No. CIV.A. 96-0758-CB-M, 1997 WL 827532, at *5 (S.D. Ala. Oct. 2, 1997) ("[E]ven if the policy could be interpreted to require that employees who become disabled be retrained to perform other jobs, failure to follow such a policy would not amount to a violation of the ADA. . . . 'While the [defendant] is free to exceed the requirements of the ADA in fashioning its policies regarding disabled employees, such policies are not the definitive source of the standard by which reasonable accommodation is measured under federal law.'") (quoting *Myers v. Hose,* 50 F.3d 278, 284 (4th Cir. 1995)).

Ms. Warren also argues that the County was on notice of her desire and ability to return to work by virtue of statements from her doctors, but her position is not well-founded. First, at best, those statements were expressions of the vague opinion of Dr. Martin, the orthopedist who treated her for her on-the-job wrist injury, that ultimately perhaps Ms. would be better off being *retrained.* For example, Ms. Warren herself notes several of Dr. Martin's reports as referring to a potential need for retraining. (*See* Pl.'s Mem. in Opp'n to Mot. for J. as a Matter of Law, Doc. 57 at 14) (quoting reports

referencing potential need for retraining). The statements in these reports include: "It might be that she would be better off to be trained in some other type of occupation which does not cause trauma or repetitive use of her wrists and hands" (Dr. Martin Office Visit Report of 10/28/93, Pl.'s Ex. 9); "It would be my opinion that she probably should be retrained in some type of lighter work which does not traumatize her joints and, more specifically, her wrists" (Dr. Martin Note to Chart of 11/24/93, Pl.'s Ex. 11); "I have advised her in the past that she probably should try to get into some other type of work that does not put as much stress on her fingers and wrists." (Dr. Martin Office Visit Notes of 12/03/93, Pl.'s Ex. 12). As noted earlier, retraining is not a reasonable accommodation under the ADA.

Second, these statements were made shortly after Ms. Warren's on-the-job injury and long before even Ms. Warren claims she was able to return to work. Third, Dr. Martin specifically stated that he deferred to the opinion of Ms. Warren's rheumatologist, Dr. Mathews, regarding Ms. Warren's prognosis. (*See, e.g.*, Dr. Martin 10/29/93 Office Visit Report, Pl.'s Ex. 9) ("I would, of course, defer to her rheumatologist regarding this."); Workers' Compensation form of 12/07/93, Pl.'s Ex. 72 (deferring to Dr. Mathews "for treatment and rating when appropriate"). In any event, Dr. Martin was merely stating that perhaps she would be better off in a different line of work. And, again, what is mentioned in these reports is retraining in its most general sense – not a reasonable accommodation, and not the argument that Ms. Warren made at trial.

Appendix B

Further, even if Ms. Warren had told the County that she wished to return to work, there is no evidence that Ms. Warren ever informed the County that she had been released to do so. Although she testified that she considered several doctor's statements as releases to work, these statements – which were made on disability forms in connection with Ms. Warren's applications for disability insurance benefits – do not state that Ms. Warren was released to work, even with restrictions. Instead, those reports and other statements from doctors stated that it was "unknown" when Ms. Warren would be able to work or left blank the question regarding when she would be able to return to work. (*See* Pl.'s Exs. 16, 17, 18, 19, 20, 22, 23, 24, 25, & 29).

The assertion that Ms. Warren believed these statements to be work releases – and that Ms. Warren believed she was able to return to work – is belied by the "Form 401s" and other documentation that Ms. Warren was submitting to the County during the same time period to update the County on her condition. Some of the leave forms that Ms. Warren submitted included the statement: "I will confirm the date of return from leave by submitting a Request for Reinstatement accompanied by my doctor's release as soon as possible prior to the date of my return. It is my full intention to return to work when released by my doctor to do so." (*See* Request for Medical Leave of Absence of 12/29/93, Pl.'s Ex. 47; Request for Medical Leave of Absence of 06/08/94, Pl.'s Ex. 51). In the "Form 401s" or Incident Reports that Ms. Warren submitted to the county periodically regarding her condition, she repeatedly advised the County that she was not able to return to work, that she was due to be reevaluated in a few months or so, and that she would continue to keep the County

informed. (*See* Form 401 of 12/22/93, Pl.'s Ex. 90 ("I am not able to return to work at this present time."); Form 401 of 02/02/94, Pl.'s Ex. 91 ("I will return to my [doctor] on April 6, 1994. I will update you as to my work status at that time."); Form 401 of 06/08/94, Pl.'s Ex. 92 ("I have been scheduled for an [appointment] . . . on Sept. 21, 1994. At this [sic] time I will find out the results of my tests and will immediately notify you of the results."); Form 401 of 09/27/94, Pl.'s Ex. 93 ("I will not be able to return to work as the condition of my hands/wrists (both) is still in a very chronic progressing stage. I am being scheduled for an MRI scan and will return to see Dr. Mathews on Dec. 7, 1994 and will notify you at that time on the status of my return to work."); Form 401 of 12/07/94, Pl.'s Ex. 94 ("I got the results of my MRI. I have continuing problems with my [left] and [right] wrist/hands. . . . I have an [appointment] to be re-evaluated by Dr. Mathews on March 8, 1995. I will contact you immediately with the results."); Form 401 of 05/31/95, Pl.'s Ex. 95 ("I am now having problems with my ankles/feet. . . . At this time an [appointment] with Dr. Mathews is on 7-26-95 – if an MRI is [illegible] within the next 3 weeks – I will inform you of that date as well as if my Dr. [appointment] is changed."); Form 401 of 11/30/95, Pl.'s Ex. 96 ("I had a Dr. [appointment] on 11-28-95 with Dr. Mathews (rheumatologist) concerning the injury on my [left] wrist and other problems. **I have still not been cleared for work at this time.** I have another appt. on March 20, 1996 and will let you know immediately as to my work status. Hope all of you have a happy holiday!") (emphasis added).

During the trial, Ms. Warren testified that Dr. Mathews had released her to return to work in May 1994; she referred

to Exhibit 19 as constituting a release to work. She also testified that she submitted another clearance to return to work in January 1995 (Exhibit 22) and in June 1995 (Exhibit 25). These exhibits, however, do not support Ms. Warren's assertions that they were releases for her to return to work. Exhibit 19, which was signed by Dr. Mathews on May 25, 1994, is an "attending physician's statement" on which Dr. Mathews checked the box indicating that Ms. Warren had a "moderate limitation of functional capacity; capable of clerical/administrative (sedentary) activity (60-70%)" and noted "no lifting > 5 lbs" and "no repetitive hand usage." (Pl.'s Ex. 19). Dr. Mathews indicated that Ms. Warren was disabled from her job but not from "any other work." (*Id.*). Dr. Mathews further indicated that Ms. Warren was not a suitable candidate for occupational rehabilitation in her job, but she was suitable for occupational rehabilitation as to "other work." (*Id.*). Dr. Mathews indicated that it was "unknown" whether her current job could "be modified to allow for handling with impairment" and that it was "unknown" when trial employment at her own job or "any other work" could commence. (*Id.*).

The other documents upon which Ms. Warren relies as "work releases"– Exhibits 22 and 25 – are also attending physician's statements completed by Dr. Mathews. Exhibit 22 is dated January 26, 1995. Similar to Exhibit 19, it indicates a "moderate limitation of functional capacity; capable of clerical/administrative (sedentary) activity (60-70%)" and noting "no lifting" and "no repetitive hand motion." (Pl.'s Ex. 22). That form indicated that Ms. Warren was totally disabled from her own job but not from other work and that Dr. Mathews expected her to recover

sufficiently to perform duties in "other work" in three to six months. (*Id.*). On that January 1995 form, Dr. Mathews further indicated that she was not suitable for further rehabilitation services in her own job or other work; that her present job could not be "modified to allow for handling with impairment"; and that vocational counseling and/or retraining was recommended. (*Id.*). Dr. Mathews left blank the question regarding when trial employment could commence. (*Id.*).

Finally, Exhibit 25, which was signed by Dr. Mathews with a "last visit" date of May 31, 1995, indicates "moderate limitation of functional capacity; capable of clerical/ administrative (sedentary) activity (60-70%)" and noting "no lifting > 5 lbs" and "no repetitive hand motion." (Pl.'s Ex. 25). That form indicates that Ms. Warren was totally disabled from her own job but not other work; that Dr. Mathews did not expect a fundamental or marked change in the future; that Ms. Warren was not a suitable candidate for further rehabilitation services in her own job or any other job; that her present job could not "be modified to allow for handling with impairment"; and that vocational counseling and/or retraining was recommended. (*Id.*). No date was filled in for commencement of trial employment. (*Id.*).

These statements from 1994 and 1995, which note capabilities but do not provide a date for recommencement of work, do not amount to work releases. Again, they were submitted at the same time that Ms. Warren was submitting Form 401s indicating that she had not been released to work. (*See, e.g.*, Pl.'s Exs. 94-96). Thus, despite Ms. Warren's assertions during trial in 2005 that she considers these documents to have been releases to work, she apparently did

not feel that she could return to work back then. More importantly, there is no evidence that the County was ever informed that she was released to work or wanted to return to work. Without such information, the County cannot be held responsible for failing to act.[6]

When she was asked at trial whether there were any written statements from any doctor after July 1995 telling

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6. Stated differently, assuming arguendo that any of Ms. Warren's reports could be construed as invoking an interactive process, any breakdown in that process was due to Ms. Warren's failure to communicate (or misleading communication) with the County rather than any action by the County. Cf. *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1286-87 (11th Cir. 1997) ("To the extent that the ADA requires an employer in some limited circumstances to engage in an 'interactive process' with the disabled employee, Happy Herman's met its burden in that regard. . . . Liability simply cannot arise under the ADA when an employer does not obstruct an informal interactive process; makes reasonable efforts to communicate with the employee and provides accommodations based on the information it possesses; and the employee's actions cause a breakdown in the interactive process.") (citation omitted); *Flores v. Am. Airlines, Inc.*, 184 F. Supp. 2d 1287, 1294 (S.D. Fla. 2002) ("[I]t is undisputed that American requested that Plaintiff provide additional medical information and Plaintiff either provided incomplete or no information. In other words, American began an interactive process with Plaintiff and the breakdown in this process is attributable to Plaintiff."). Here, the County continually advised Ms. Warren each time her leave was going to expire and the need for her to complete a new leave request, and Ms. Warren repeatedly applied for leave and supplied the County with forms indicating that she was still not cleared for work and would keep the County informed as to her condition. Based on the information that the County had, there is no way the County could have reasonably concluded that Ms. Warren desired to return to work.

the County that she was able to come to work – on light duty, full duty, or any kind of duty – Ms. Warren answered, "No." She also agreed that she had not had any oral communications with any one at the County, instead stating that she merely did what she was instructed to do in letters from Gary Swift, the County's administrative services manager, regarding remaining on leave. As noted earlier, although Ms. Warren characterizes the letters from the County as mandating that she submit leave forms – as if she did not have the option of informing the County that instead of remaining on leave she wanted to return to work with or without an accommodation – the letters merely informed her that her leave was expiring and that if she wanted to remain on leave she would have to fill out new forms and otherwise she would be terminated. The County was not forcing Ms. Warren to remain on leave, and if she wanted to return to work it was incumbent upon her to let the County know of this desire.

Because none of her doctor's statements requested an accommodation, Ms. Warren's reliance on the EEOC Enforcement Guidance is misplaced. She notes a portion of the EEOC Enforcement Guidance stating that "a . . . health professional or other representative may request a reasonable accommodation on behalf of an individual with a disability." (Pl.'s Trial Br., Doc. 25 at 12). That Guidance cites an example where "[t]he employer's doctor sends the employer a letter, stating that the employee is released to return to work, but with certain restrictions." (Doc. 25 at 12) (quoting EEOC Enforcement Guidance). However, there is no evidence that this ever occurred here. Although Ms. Warren testified that she considered certain of her doctor's statements to be

releases to work, those documents do not have that effect and are contradicted by other forms that Ms. Warren herself completed during the same time period. *See Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1046-47 (6th Cir. 1998) ("The employer is not required to speculate as to the extent of the employee's disability or the employee's need or desire for an accommodation. . . . The last thing the Company heard from Plaintiff was that she did not know when she would be able to return to work. . . . Because Plaintiff made no request for accommodation the district court properly found that she failed to create an issue of fact as to whether or not the Company failed to reasonably accommodate her.").

Finally, even if there were evidence that Ms. Warren had informed the County of her desire and ability to return to work and her wish to be reassigned, she failed to establish at trial that a reasonable accommodation was available for her. *See Reed v. Heil Co.*, 206 F.3d 1055, 1062 (11th Cir. 2000) ("Reassignment is only a reasonable accommodation if a position for which the plaintiff is qualified is available."). Although through her own testimony and that of County employees Ms. Warren presented evidence that during the several-year period at issue the County had some clerical job openings, such evidence is not sufficient to meet her burden on this issue. *Cf., e.g., Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1258 n.5 (11th Cir. 2001) (finding that testimony of manager "that he was 'sure' there were 'several positions' open at the Distribution Center in the summer of 1996, including 'warehousing, night crew, receiving, picking, [and] packing' . . . consist[ed] solely of [the manager's] speculation regarding the existence of vacant positions" and "falls far short of the evidence needed to establish that a

specific reasonable accommodation, in the form of a vacant position, actually existed at the Distribution Center"); *Turner v. Mobile Infirmary Ass'n*, No. CIV.A. 96-0758-CB-M, 1997 WL 827532, at *5 (S.D. Ala. Oct. 2, 1997) ("[P]laintiff does not meet her burden simply by pointing to a job she could have performed. She must also prove that there was a vacancy in that position. . . . [P]laintiff's evidence that she could have performed the duties of an outpatient file clerk, without evidence that there was an opening in that position, does not create a genuine issue of material fact.").

IV. Conclusion

In sum, there is no evidence that Ms. Warren ever requested an accommodation from the County or indicated in any way her desire to return to work for the County. Although the ADA requires employers to treat persons with disabilities fairly, it does not require employers to be mindreaders. The County was not put on notice that Ms. Warren desired to return to work in any capacity after her September 1993 injury. The documentation that Ms. Warren provided to the County repeatedly informed the County that she was not able to return to work and that she would provide updated information as she acquired it. She did not ever advise the County that she was willing or able to return to work, and this is fatal to her case.

In accordance with the foregoing, it is **ORDERED** and **ADJUDGED** as follows:

1. Defendant Volusia County's ore tenus Motion for Judgment as a Matter of Law *(see* Doc. 50) and its Renewed

Appendix B

Motion for Judgment as a Matter of Law (Doc. 56) are **GRANTED.**

The jury verdict (Doc. 53) is **VACATED.**

The Clerk is directed to enter a judgment in favor of the Defendant in accordance with this Order and thereafter to close the file.

DONE and **ORDERED** in Orlando, Florida this 17th day of October, 2005.

s/ John Antoon II
John Antoon II
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH DENYING PETITION FOR REHEARING FILED AUGUST 29, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH

No. 05-16411-FF

KATHLEEN WARREN,

Plaintiff-Appellant,

versus

VOLUSIA COUNTY, FLORIDA,

Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: ANDERSON, BIRCH and KRAVITCH, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the

Appendix C

Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

No. 06-755

Supreme Court, U.S.
FILED
DEC 27 2006

In The

Supreme Court of the United States

KATHLEEN WARREN,

Petitioner,

v.

VOLUSIA COUNTY FLORIDA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether circuit conflict has been created by an Eleventh Circuit finding of no *prima facie* case of ADA discrimination for lack of reasonable accommodation based on circuit precedent consistent with that of other circuits or because the court has not addressed an ADA issue on which other circuits have ruled.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption. Respondent is a governmental entity. There are no corporate interests.

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UNITED STATES SUPREME COURT RULES

Sup. Ct. R. 10 3

STATUTORY PROVISIONS INVOLVED

Title 42, United States Code Annotated, Section 12112 (2006), Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

STATEMENT OF THE CASE

Petitioner, Kathleen Warren, seeks review of an Eleventh Circuit decision [App. 1a-9a.] affirming a judgment as a matter of law [App. 10a-33a.] which found that Respondent, County of Volusia, Florida, had not discriminated against her under the Americans with Disabilities Act, (ADA) 42 U.S.C. §12112(a). The pertinent facts are set forth in the Eleventh Circuit opinion and the district court order. They briefly are recounted here.

Petitioner became employed as a corrections officer for respondent in 1989. App. 11a. On September 27, 1993, petitioner sustained an on-the-job injury to one of her wrists. *Id.* Petitioner briefly returned to work, but then went out on leave based on doctor's notes. *Id.* In addition to her on-the-job injury, petitioner also suffered from rheumatoid arthritis, a condition which pre-existed her employment and worsened over time. *Id.* Although petitioner remained as an inactive County employee for years after her injury – on various leave statuses – she did not

actively work for the County (as a corrections officer or otherwise) after October, 1993. *Id.*

Petitioner received workers' compensation benefits for a brief period, followed by short- and long-term disability benefits. *Id.* Petitioner's workers' compensation case against the County was settled in 1997. *Id.* Petitioner testified at trial that she was completely disabled from all types of work as of late 1999, but that she was able to work prior to that time and that the County discriminated against her by not accommodating her disability. *Id.*

Reviewing trial evidence most favorably to petitioner, the Eleventh Circuit found she never requested an accommodation, either on her own or through a representative. App. 8a. Petitioner admitted that she personally never requested an accommodation. App. 8a. Petitioner claimed at trial that she requested an accommodation through her workers' compensation attorney who during settlement discussions had sought assistance only with "retraining." App. 3b. The Eleventh Circuit observed that a request for retraining is insufficient under the ADA because retraining is not a reasonable accommodation. App. 8a. The court stated that the ADA does not require the county to reassign petitioner to a position for which she is not qualified. *Id.*

Petitioner also claimed at trial that forms completed by treating doctors placed respondent on notice of her desire to return to work. These statements were made before she claimed that she was able to return to work and indicated merely a need for "retraining." App. 23a. None stated whether and when petitioner would be released to return to work even with restrictions. App. 25a.

Petitioner admitted that the physician was not acting as her representative. App. 8a.

SUMMARY OF ARGUMENT

Petitioner advances two faulty premises. First, petitioner vacuously asserts that though prior Eleventh Circuit cases holding that an ADA reasonable accommodation claim must show a request for a reasonable accommodation accord with those of other circuits, the application of that principle to the facts here created conflict by requiring perfection. Second, petitioner argues nonsensically that there is circuit conflict because the Eleventh Circuit thus far has not ruled whether an employer has an ADA obligation to engage in an interactive process to determine a reasonable accommodation for an employee. Neither contention merits review.

ARGUMENT

A principal use of certiorari jurisdiction is to resolve conflicts among Circuit Courts of Appeals concerning the meaning of federal law. *Braxton v. U.S.*, 500 U.S. 344, 347 (1991). "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. "A petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." *Id.* The petition does not meet the high standard for review.

I. No circuit conflict has been created by an Eleventh Circuit finding that petitioner failed to establish *prima facie* ADA discrimination case because she did not show a request for reasonable accommodation.

To establish a *prima facie* ADA claim of discrimination, a claimant must show that she has a "disability" as defined by the ADA, that she is a "qualified individual" (able to perform the essential functions of the employment position that she holds or seeks with or without reasonable accommodation), and that the employer unlawfully discriminated against her because of the disability. *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1226 (11th Cir. 2005); *Dvorak v. Mostardi Platt Associates, Inc.*, 289 F.3d 479, 483 (7th Cir. 2002); *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1135 (8th Cir. 1999); *Gaul v. Lucent Technologies, Inc.*, 134 F.3d 576, 580 (3d Cir. 1998); *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867, 869-70 (2d Cir. 1998); *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1178 (6th Cir. 1996); *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758, 763 (5th Cir. 1996); *Katz v. City Metal Co. Inc.*, 87 F.3d 26, 30 (1st Cir. 1996); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996); *Doe v. University of Maryland Medical System Corp.*, 50 F.3d 1261, 1264-65 (4th Cir. 1995); *White v. York International Corp.*, 45 F.3d 357, 360-61 (10th Cir. 1995).

A claimant asserting denial of reasonable accommodation must show that she requested one. *Cutrera v. Board of Supervisors of Louisiana State University*, 429 F.3d 108, 112 (5th Cir. 2005); *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 260-61 (1st Cir. 2001); *Gaston v. Bellingrath Gardens & Home, Inc.*, 167 F.3d 1361, 1364 (11th Cir. 1999); *Gantt v. Wilson Sporting Goods, Co.*, 143 F.3d 1042, 1046-47 (6th

Cir. 1998); *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 165 (5th Cir. 1996), *cert. denied*, 519 U.S. 1029 (1996). Petitioner does not dispute circuit agreement on the prerequisite. Surveying the circuits, petitioner concedes their holdings "can be reconciled with prior Eleventh Circuit cases but not with the decision herein." Pet. 10. Petitioner concludes however that "[i]n the previous [Eleventh Circuit] cases, the failure to specifically identify a reasonable accommodation was a failure of proof at trial and not an essential element of the trigger [of an interactive process regarding accommodation]." *Id.*

The Eleventh Circuit did not create a new standard for a request for reasonable accommodation. Its *de novo* record review found that petitioner never requested any accommodation, either on her own or through a representative. App. 8a. The court did not hold that a lawyer's request is invalid. It found that a retraining request was not one for a reasonable accommodation. "If an employee must be retrained in order to fulfill the job requirements, the employee is not 'qualified' under the ADA." App. 8a. (*citing Willis v. Conopco, Inc.*, 108 F.3d 282, 284 (11th Cir. 1997). The beaten decisional path followed by the court is that claimant must show that she can perform the essential functions of the job. *Cleveland v. Policy Management Systems Corporation*, 526 U.S. 795, 806 (1999); *Reed v. LePage Bakeries, Inc.*, 244 F.3d at 259; *Gaul v. Lucent Technologies*, 134 F.3d at 580; *Monette v. Electronic Data Systems Corp.*, 90 F.3d at 1183-84; *White v. York International Corp.*, 45 F.3d at 361-62; *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 882 (6th Cir. 1996); *Tyndall v. National Educational Centers, Inc. of California*, 31 F.3d 209, 212-13 (4th Cir. 1994). Petitioner failed in her proof at trial.

II. No circuit conflict has been created by the absence of an Eleventh Circuit ruling that an employer is obliged by the ADA to engage in an interactive process.

Petitioner asserts Eleventh Circuit conflict with other circuits on whether an interactive process with the employee is mandatory following a request for accommodation. Petitioner states that "the Eleventh Circuit has never expressly held that the ADA requires an employer to engage in an interactive process with the employee to identify reasonable accommodations . . . " Pet. 5. Nor has the court ruled to the contrary. The Eleventh Circuit has not addressed this point. No Eleventh Circuit case, including this one, has required its decision of the issue. There is no conflict to resolve.

CONCLUSION

WHEREFORE, respondent respectfully requests that this Court deny the petition.

Respectfully submitted,

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Dated: December 27, 2006